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709-854—65

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 980

ROBERT HALL LEWIS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 110a–116a) is reported at 338 F. 2d 137.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1964 and rehearing was denied on February 10, 1965. The petition for a writ of certiorari was filed on March 12, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court committed prejudicial error in questioning witnesses.

2. Whether petitioner was deprived of substantial rights in a hearing on a motion for new trial when

the judge, on suggestion of defense counsel and without objection, conducted the interrogation of the recanting prosecution witness.

3. Whether the trial court abused its discretion in dismissing a motion for a new trial upon an affirmative finding that a recanting prosecution witness told the truth at the trial.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Southern District of Ohio of unlawfully, wilfully and knowingly receiving the proceeds of the armed robbery of a Federal Savings and Loan Association in violation of 18 U.S.C. 2113(c) (R. III, 638).[1] He was sentenced to imprisonment for a period of ten years (Pet. App. 108a–109a). Petitioner appealed on the grounds, among others, that the trial judge committed prejudicial error in questioning witnesses and that the evidence was insufficient to go to the jury. While the appeal was pending, one of the government witnesses executed an affidavit recanting his trial testimony. The court of appeals held the appeal in abeyance pending consideration by the trial court of a motion for a new trial based on newly discovered evidence. The trial court held a hearing on the motion in which it considered affidavits filed by both sides (R. V, 27–28) and additional testimony of the recanting witness (R. V, 29–46). The trial court affirmatively found "that

[1] The record is in six volumes. Volumes II–III is the transcript at trial. Volume V is the transcript of the hearing on the motion for a new trial.

under all the circumstances of this case, it is clear to this Court that this material witness, Mr. Bebout, did not tell the truth in this affidavit and * * * told the truth in the trial" (R. V, 49). Accordingly, it denied the motion for a new trial. The court of appeals affirmed the conviction. 338 F. 2d 137.

The evidence at trial may be summarized as follows:

The petitioner and Charles Edward Bebout have known each other since 1952 (R. II, 292). Mr. Bebout came to Columbus, Ohio in October 1962 and communicated with petitioner (R. II, 293). About a week later they discussed the robbing of a bank (R. II, 307–308). On December 14, 1962, with the knowledge and assistance of petitioner, Mr. Bebout robbed the Ohio Federal Savings and Loan Company, using petitioner's 1959 Cadillac as a getaway car (R. II, 283–286). Mr. Bebout and petitioner met and counted the proceeds of the robbery, amounting to almost $35,000 (R. II, 286–287). At that time, petitioner received about $300 (R. II, 288). The next day, Saturday, December 15, 1962, petitioner again met Mr. Bebout and received an additional $6,700 of the stolen money (R. II, 288–289). On Sunday, December 16, 1962, petitioner drove Mr. Bebout to Wheeling, West Virginia and returned alone to Columbus the next day (R. II, 289, 304–307, 310).

Between December 17–26, a period in which he was being intermittently interviewed by the F.B.I. (R. III, 509–517), petitioner went to the home of one Charlotte See and left a package (R. II, 23–24, 38). This package was stolen from the home of Miss See by one James Long (R. II, 24–25, 93–95), who found

that the package contained about $5,000 (R. II, 95). Miss See learned that Long had taken the package (R. II, 25) and told him to return it (R. II, 56, 95). Instead, he made a trip to the west coast, spending the money as he went (R. II, 95–96). Miss See also advised petitioner that the package had been stolen (R. II, 37). Thereafter, she received several anonymous telephone calls concerning it. On one occasion she was instructed to deliver what James Long returned to her to attorney Joseph Hans (R. II, 26, 45–46). Mr. Long came back from the west coast and returned to Miss See some $1100 of the money he had taken from her home (R. II, 44, 97–99), which money she delivered to Joseph Hans (R. II, 45, 176–177). Mr. Hans was approached by the F.B.I. and turned the money over to them (R. II, 181). This money was checked against a list of serial numbers of bills recorded as a part of the bank's precautions against robbery, and it was found that some of the "bait money" was among the bills given by Mr. Hans to the F.B.I. (R. II, 233–236, 266).

ARGUMENT

1. There is no merit in petitioner's assertion that questioning of witnesses by the trial judge prejudiced him. We count 478 questions asked by the judge, not the "in excess of 1,100 questions" alleged by petitioner (Pet. 10). More than half of those questions were directed to two witnesses testifying to the confusing circumstances surrounding the theft and recovery of the package left by petitioner at the home of Charlotte See (R. II, 55–73, 87–91, 145–160).

Much of the questioning reflected on the credibility of Miss See and could only have been helpful to petitioner (R. II, 60–61, 87–91). Petitioner cites no question that in any way indicates an opinion of the judge as to the truthfulness of the witness or the guilt of the defendant. At no time during the trial did defense counsel object to questions asked by the court. At the close of all the evidence, the trial judge instructed the jury as follows (R. III, 633):

> You are further instructed, ladies and gentlemen, that if the judge has said or done anything which has suggested to you that he is inclined to favor the claims or positions of either of the parties, you will not suffer yourselves to be influenced by any such suggestion.
>
> I have not expressed, nor have I intended to express, any opinion as to what witnesses are or are not worthy of credence or what inference or inferences should be drawn from the evidence adduced in this case.
>
> During the course of the trial I occasionally asked questions of a witness in order to bring out facts not then fully covered in testimony. Do not assume that I hold any opinion on the matters to which my questions related. Remember at all times that you as jurors are at liberty to disregard all comments of the Court in arriving at your own findings as to the facts.

The court of appeals read the entire trial transcript and concluded that the questions asked by the trial court were not so phrased as to indicate an opinion "as to the veracity of the witnesses or as to the guilt of defendant" (Pet. App. 115a–116a). The conduct of the trial court in this instance was in accordance with

its duty to question witnesses for the purpose of eliciting the truth and assuring that issues are not obscured or testimony misunderstood. See *Glasser* v. *United States*, 315 U.S. 60, 82; *Knapp* v. *Kinsey*, 232 F. 2d 458, 466 (C.A. 6), certiorari denied, 352 U.S. 892; *Griffin* v. *United States*, 164 F. 2d 903 (C.A.D.C.).

2. Petitioner's assertion that he was prejudiced on his motion for a new trial by the trial court's "refusal" to permit defense counsel to ask any questions of the recanting prosecution witness is refuted by the record. The court never denied counsel permission to ask questions. The procedure employed was suggested by defense counsel midway in the proceedings (R. V, 22–23) and confirmed at the time the witness was to be called, when the court asked defense counsel if "it is your suggestion then that the Court examine him on the matter?" (R. V, 27). Counsel replied that "[we] would be perfectly satisfied for the Court to do it, although we would have some questions we would like to ask him" (R. V, 27). The judge made it clear at this point that he thought he could decide on the basis of the affidavits alone but wanted to hear the whole matter (R. V, 27–28). During examination the witness recanted his trial testimony without reservation. Neither prosecution nor defense counsel examined the witness or objected to the procedure followed. Both apparently were satisfied that further examination was unnecessary. Indeed, defense counsel indicated his satisfaction with the results, saying that "I think it is fully in the record unequivocally and unreserved" (R. V, 46) and that "we feel that the Court has heard all of the evidence in this case

with this unequivocal denial * * *" (R. V, 46). If the remarks quoted by petitioner are read in context, it is plain that there was no "hostility" or "advocacy tactics" in the trial court's conduct of the hearing.

3. The recantation of Mr. Bebout did not require the granting of a new trial. Prior to trial, Mr. Bebout wrote a memorandum "To Whom It May Concern," recanting the testimony he gave before the grand jury—testimony which was substantially the same as that which he later gave at the trial (R. III, 363). At trial, however, the witness repeated the grand-jury testimony in convincing detail and withstood extensive cross-examination, in which it was brought out that he had written the recanting memorandum. The question of recantation, therefore, was considered by the jury, and the verdict of conviction necessarily implied that the jury believed the trial testimony and disbelieved the recantation. Subsequently, Mr. Bebout executed an affidavit, stating that his grand-jury testimony was the product of duress and that his trial testimony was false. But at the hearing on the motion for new trial, Bebout's testimony regarding the alleged coercion fluctuated considerably (R. V, 31–40). We note, moreover, that by the time of the trial, Bebout had already been sentenced for his part in the bank robbery and the time for reduction of sentence had expired (R. V, 24–26). There was no incentive for him to give false testimony at that point. The trial judge who heard the testimony and observed the demeanor of the recanting witness both at the trial and at the post-trial

hearing was convinced that it was the recantation, rather that the testimony, which was false.

Moreover, the circumstances in which the affidavit of recantation was executed cast serious doubt upon its veracity. About a month before Bebout executed the affidavit recanting his trial testimony, he wrote a series of letters to Robert A. Bell, the Assistant United States Attorney handling the Lewis case. One on April 14, 1964 inquired about a date for the assumed new trial of petitioner (R. IV, 43). Two days later, Bebout again wrote Mr. Bell as follows (R. IV, 44-45):

> I wi[illegible]t to be understood that if, and when I am returned to Columbus, as a government witness, my desire is to be declared "hostile" to the government, and "friendly" to the defense.
>
> I have written Mr. Paul Scott [defense counsel] and advising him of my intentions to "cooperate" ~~with the Lewis interests~~ in every respect.
>
> I have been recommended for transfer to Marion, Ill. *Lets face it.* [Emphasis in the original.] With the Lewis money and power my life would be valueless there.

On May 11, 1964, Bebout wrote Mr. Bell to the effect that he had written the trial judge and defense counsel that his testimony at trial was not the truth, and further stated that "I wish to sign the statements within the week, as I am *definitely* [emphasis in the original] pending transfer to Marion, Ill." (R. IV, 45). On May 18, 1964, seven days later, Bebout executed the affidavit recanting his trial testimony. The United States Attorney felt that these letters show

"a progressive attempt to have the office of the United States Attorney interfere with his transfer on the threat of upsetting the jury verdict in the Lewis case" (R. VI, 5).

Under all the circumstances, the trial court was justified in refusing to credit the recantation. There is no reason to disturb its findings which were concurred in by the court of appeals. *United States* v. *Johnson*, 327 U.S. 106, 111; *Shotwell Manufacturing Co.* v. *United States*, 371 U.S. 341, 356–357.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965